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Supreme Court of the United States

OCTOBER TERM, 1955

No. 438

H. E. WHITE, CHARLES R. HALL, JENNINGS LILLY, W. C. WHITE and JOHN RONCAGLIONE,

Appellants,

vs.

ALBERT ANSON, JR., H. M. BEDDOW, A. S. THOMAS, JR., H. G. KENNEDY and DR. H. R. GLASS, MEMBERS OF THE BOARD OF EDUCATION OF KANAWHA COUNTY, WEST VIRGINIA.

APPEAL FROM THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA

STATEMENT AS TO JURISDICTION

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APPEAL FROM THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA

STATEMENT AS TO JURISDICTION

Appellants appeal from the final order of the Supreme Court of Appeals of the State of West Virginia entered May 23, 1955, refusing to issue a writ of mandamus in an original action against the appellees to compel the issuance of a permit to allow appellants to use the school auditorium for a public religious assembly and denying the application "as plainly right." Appellants submit this statement to show that the Supreme Court of the United States has juris-

diction of the appeal and that a substantial question is presented.

OPINION BELOW

No opinion was written by the Supreme Court of Appeals. The only thing that was said by that court appears in the order denying the writ of mandamus "as plainly right." (R. 17)[1] This order appears as Appendix A to this jurisdictional statement.

Application for writ of mandamus was first submitted to Honorable Frank L. Taylor, Judge of the Circuit Court of Kanawha County, West Virginia, at Charleston. (R. 4-9) He refused to issue the writ of mandamus for the reason stated in a letter dated March 12, 1955, addressed to counsel for appellants. (R. 13-15) This unofficial opinion of the Judge of the Circuit Court appears as Appendix B to this jurisdictional statement. (R. 13)

JURISDICTION

This action was brought as an original action in the Supreme Court of Appeals of West Virginia, pursuant to the statutes of West Virginia and the rules of that court. The final order of that court, denying the application for a writ of mandamus, was entered on May 23, 1955. (R. 17) The notice of appeal to the Supreme Court of the United States was filed in the Supreme Court of Appeals of West Virginia, on August 10, 1955. (R. 30) The jurisdiction of the Supreme Court of the United States to review this decision by appeal is conferred by Title 28, United States Code, Section 1257 (2). The jurisdiction of the Supreme Court of the United States to review the final order of the Supreme Court of Appeals is sustained by *Matthews* v. *Hamilton,* 320 U. S. 707 (1943); *Williams* v. *Bruffy,* 96 U. S. 176, 183 (1877); *Hamilton* v. *Regents,* 293 U. S. 245 (1934);

[1] Figures within parentheses refer to the typewritten certified transcript of the record on file in the office of the Clerk.

Atchison T. & S. F. Ry. Co. v. *Public Utilities Comm'n,* 346 U. S. 346, 348-349 (1953). Compare *West Virginia State Board of Education* v. *Barnette,* 319 U. S. 624 (1943).

QUESTIONS PRESENTED

ONE

Where Section 1780 of the Code of West Virginia provides for the use of school property as a civic center and place of public assembly and the appellees, as school board members, are authorized by the statute to permit the use of school property as a place of religious assembly, and do permit the use of the school auditorium for a place of religious assembly by other religious groups, similar to the use proposed by appellants, and appellants apply for the same use of the school auditorium in a timely and proper manner, and which requested use is not inconsistent with school uses or the statutes and Constitution of West Virginia, does Section 1780 of the Code of West Virginia, as construed and applied, violate the constitutional rights of appellants contrary to the First Amendment to the United States Constitution and the equal protection and due process clauses of the Fourteenth Amendment to the United States Constitution, when the application for the writ of mandamus showed other church organizations were permitted by appellees to make unrestricted use of the school auditorium for religious assemblies, while the same use thereof was denied to appellants?

TWO

In the event that the appellees are not estopped from relying on the separation of church and state clause of the First Amendment to the United States Constitution, because of having discriminated against appellants by allowing other religious organizations to use the civic center auditorium, then there is presented the question of whether such clause of the First Amendment prohibits a religious organi-

zation from making incidental use of public property such as the sidewalks, the streets, the parks and public buildings, by preaching or holding religious assemblies in common with the same use by other groups that are not religious.

STATUTE INVOLVED

Section 1780 of the Code of West Virginia provides as follows:

> "The board of education of any district or independent district shall have authority also to provide for the free, comfortable and convenient use of any school property to promote and facilitate frequent meetings and associations of the people for discussions, study, recreation and other community activities, and may secure, assembly and house material for use in the study of farm, home and community problems, and may provide facilities for the dissemination of information useful on the farm, in the home, or in the community." (R. 18-19)

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Section one of the Fourteenth Amendment to the United States Constitution provides:

> ". . . No State shall make or enforce any law which shall abridge the privileges or immunities

of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT

Appellants requested the appellees by letter dated January 19, 1955, for the use of one of the high school auditoriums in Charleston, for a religious assembly from 7 to 10 o'clock on some evening convenient to the parties. (R. 10) The application was received by the Board of Education. The board referred it to the attorney for the board for advice on the legal "rights and obligations" of the board. (R. 16) On March 11, 1955, appellees notified appellants that "the Board considered the report of its attorneys relative to the question of whether it had authority to permit the use of school buildings for religious meetings. It is the opinion of the attorneys for the Board that the Board lacks authority to permit the use of school buildings for religious meetings. Therefore, the request of the Jehovah's Witnesses must be declined." (R. 11)

A petition for writ of mandamus was presented to the Honorable Frank L. Taylor, Judge of the Circuit Court of Kanawha County, West Virginia. (R. 4-9) On consideration of the petition he declined, on March 12, 1955, to issue the writ of mandamus "in the absence of a decision by the Supreme Court of Appeals upholding such right." (R. 2, 14) Thereafter, on April 12, 1955, the petition for a writ of mandamus was submitted to the Supreme Court of Appeals of West Virginia. (R. 2-9) That court, on April 18, 1955, denied the application. The court said: "Upon consideration whereof the Court being of opinion that a rule should not be awarded, it is therefore ordered that the same be and it is hereby denied." (R. 1, 25)

Under the rules of procedure of the Supreme Court of Appeals of West Virginia, this was not a final order because

the petition had not been denied "as plainly right." Thereafter, on May 16, 1955, appellants presented to the Supreme Court of Appeals again "their first and second petitions, and notes of argument in support thereof, praying for a writ of mandamus". (R. 17)

In the petition for writ of mandamus that appellants submitted to the Judge of the Circuit Court of Kanawha County, which first petition was submitted also, and resubmitted the second time, to the Supreme Court of Appeals, they alleged discrimination and a denial of equal protection of the law. The appellants alleged in paragraph 12 of such first petition as follows:

> "12. Relators say that the leasing, renting and permitting the use of school property and facilities to other kinds of organizations, groups and individuals, and denying their use to religious groups and organizations, constitutes a denial of the equal protection of the laws, a denial of the right of assembly, a denial of the right of free speech, a denial of equal justice, and constitutes class legislation, in violation of Clause 3, Article VI, and the First, Fifth and Fourteenth Amendments to the Constitution of the United States, and in violation of Article II, Section 2, and Article III, Sections 1, 2, 3, 7, 11, 15, 16, 17 and 20, of the Constitution of West Virginia, and is a deprivation of religious liberty so guaranteed. It also constitutes a misapprehension of law." (R. 6-7)

Appellants alleged in paragraph 15 of said first petition:

> "That said Kanawha County Board of Education is not consistent in its refusal to permit the use of said school property and facilities by Jehovah's Witnesses because of its contention that it is unlawful to permit such use for religious purposes, as it has been the regular and long

established policy of said Board of Education of Kanawha County to permit other religious organizations and ministers of other religious denominations to use said property and facilities for religious purposes, and to have all senior classes to attend baccalaureate sermons, and to have invocations, prayers and benedictions uttered at commencement exercises and to have ministers of various faiths address high school assemblies and other school meetings and classes in the schools, and to give such prayers before athletic contests, and to have choirs of religious organizations sing religious songs at school assemblies and meetings, and to have teachers' meetings opened with prayer and closed with benedictions, and to permit other religious exercises, and to have school bands and orchestras trained to play religious music, and choral groups to sing religious songs, and to hold Christmas parties and celebrations, and other religious exercises." (R. 7-8)

Attached to said first petition were newspaper clippings and other documents showing a consistent policy of the appellees to allow other organizations to make use of the school auditorium similar to that proposed by the appellants. (R. 25)

In the second petition that was resubmitted to the Supreme Court of Appeals of West Virginia, along with the first petition, appellants alleged that each held "an important official position with Jehovah's Witnesses, commonly denoted a religious organization, engaged in Bible and missionary training for the general public." (R. 18) The position of the appellees as members of the Board of Education was also alleged. Appellants alleged that the appellees were authorized to permit "the use of school buildings as civic centers under the provisions of Section 1780 of the Code of West Virginia." (R. 18)

Appellants alleged in said second petition that appellees

as a common practice rented school auditoriums "to the general public, and to various private organizations . . . and to unions and political parties for meetings, and have established regular rental rates to cover all expenses pertaining to such use." (R. 19)

Appellants also alleged that they had regular meeting places in Kanawha County that met "all ordinary requirements, but that occasionally they desire to hold circuit or regional assemblies attended by members from a wide area and by the general public . . . and that upon such occasions they need to obtain the use of auditoriums accommodating seven hundred or more people." (R. 19)

Appellants alleged that their two applications for use of the Charleston High School auditorium "for one of such area assemblies and Bible lectures" were denied, and that the Board of Education declined said requests on the ground that school buildings could not be used for religious meetings. (R. 20) Appellants then alleged that the attorneys had illegally misinterpreted the Constitution of West Virginia. (R. 20-21)

Appellants alleged that the proposed use of the school auditorium was "an occasional use of public property for a religious meeting" that did not violate the rule of separation of church and state, and that any other interpretation would prevent the use of the auditorium for religious meetings that are "frequently held therein, on the same basis as Jehovah's Witnesses seek to use on rare occasions a school auditorium." (R 21) They alleged that "to deny them the rare occasional use requested would be a violation of the equal protection of the laws, and unlawful class legislation, and an abuse of discretion." (R. 22)

Appellants further alleged that "if Jehovah's Witnesses were permitted to lease a high school auditorium as requested, they would be independent and private contractors, and their use for a Bible lecture would in no sense constitute a joinder of church and state. It would constitute a strictly private use the same as if leased to any of the

other organizations commonly permitted to use such auditoriums." (R. 22-23)

In paragraph 12 of the second petition appellants alleged as follows:

> "12. Relators say that they have complied with all lawful requirements for the use of said school property and facilities, and have been unlawfully denied the use of same, and that said board of education is not consistent in its refusal to permit the use of said school auditoriums by Jehovah's Witnesses, because it has been the regular and long established policy of said Board of Education of Kanawha County to permit other religious organizations and ministers of other religious denominations to use said property and facilities for religious purposes, and to have all senior classes attend baccalaureate sermons, and to have invocations, prayers and benedictions uttered at commencement exercises, and to have ministers of other faiths address high school assemblies, and to give prayers for victory at athletic contests, and to have choirs of religious organizations and denominations sing religious songs at school assemblies, and to have student and teacher meetings opened and closed with invocations, prayers and benedictions, and to permit other religious exercises at schools, and to have high school bands play religious music, and choral groups and choirs sing religious songs, and to hold Christmas parties and celebrations, and other religious exercises." (R. 23)

Appellants then further alleged that "it is the established policy of the State to encourage religious organizations of all denominations" and that thereby provision had been made "to grant tax exemption to religious organizations upon their income, property and holdings." (R. 23-

24) Appellants further alleged that religious activities were "matters of general public interest, . . . and that religion is a proper subject for frequent meetings and associations of the people." (R. 24)

It was affirmatively alleged by appellants that the statute (Section 1780 of the Code of West Virginia) included religious uses within the term "other community activities" used in the statute. (R. 24)

Appellants alleged their original presentation of the petition for writ of mandamus to the Judge of the Circuit Court and his refusal to act thereon. (R. 24) Appellants then alleged the presentation of their first petition to the Supreme Court of Appeals on April 12, 1955, and the denial thereof on April 18, 1955, "without having been refused as plainly right." (R. 25)

Appellants alleged that use of school property under Section 1780 of the Code of West Virginia was not "sectarian use in violation of Federal or State constitutions." (R. 25) They alleged that the use of the school auditoriums as a civic center was similar to "the use of public parks." (R. 25)

In paragraph 15 of their second petition appellants alleged, in part, as follows:

> "Discrimination on the basis of religion is as much forbidden by the United States and West Virginia constitutions as on the ground of race, color, or previous condition of servitude. Under the First Amendment to the United States Constitution there is no discrimination authorized against religious assemblies in favor of other types of assemblies, and interference with assembly constitutes a denial of religious freedom." (R. 25)

Appellants further alleged that to deny the use of school auditoriums for religious assemblies would be a violation of the state and federal constitutions. (R. 26)

In paragraph 20 of their second petition appellants alleged:

> "20. Relators say that said Kanawha County Board of Education has been guilty of unlawful, arbitrary and capricious discrimination, in that they have leased school property on many occasions to religious denominations for religious purposes, and that some of the instances where this has been done include the Thomas Jefferson Junior High School Auditorium regularly to the Christian Science Church; the St. Albans High School Auditorium to the Grace Baptist Church, of St. Albans; the Marmet Junior High School Auditorium to a Methodist Church in Marmet; also for the presentation of the Billy Graham movie, and other religious movies and religious programs." (R. 27)

In paragraph 21 appellants alleged:

> "21. Petitioners refer to the exhibits and affidavits filed with this petition at the end thereof which they believe show conclusively the uses which have been permitted by the defendants of school property and by other officials of other public property and which petitioners believe show definite discrimination on the part of the defendants against said applicants and an unlawful, arbitrary and capricious discrimination." (R. 28)

Appellants in their prayer for relief requested "that a time be fixed with the Court for a full and fair hearing upon the allegations of this petition, and such answers as may be made thereto by said respondents." They also asked in said prayer that the writ of mandamus issue. (R. 28-29)

The above and foregoing second petition for writ of

mandamus was presented as an original action to the Supreme Court of Appeals of West Virginia on May 16, 1955. (R. 17) On May 23, 1955, that court entered a final order which, among other things, reads as follows: "Upon consideration whereof the Court being of opinion that a rule should not be awarded, it is therefore ordered that the same be and it is hereby denied, on this second application, as plainly right." (R. 17)

THE QUESTIONS ARE SUBSTANTIAL

The issues involved on this appeal are similar to those raised in *Ellis* v. *Dixon,* certiorari granted 347 U. S. 926, ordered reargued 348 U. S. 881, certiorari dismissed because improvidently granted 75 S. Ct. 850, 851. In that case this Court said:

> ". . . We approach the matter first by considering what the petitioner has alleged as a basis for the constitutional issues which he asks us to review on the merits.
>
> "The constitutional questions involved are whether respondents, members of the Yonkers Board of Education, in refusing the use of any of the Yonkers public school buildings to the Yonkers Committee for Peace for a forum on 'peace and war,' discriminated against the Committee, so as to deprive the Committee's members of their rights of freedom of speech, assembly, and equal protection of the laws, under the First and Fourteenth Amendments." 75 S. Ct. at page 852.

The appellants here have alleged a plain case of discrimination and a denial of equal protection of the laws contrary to the First and Fourteenth Amendments to the United States Constitution, which were not alleged by the petitioner in *Ellis* v. *Dixon,* 347 U. S. 926. The very same questions that led this Court to grant the petition for writ of certiorari in the *Ellis* case abound here for the holding

that the questions presented are substantial. The identical question was presented in the *Ellis* case. The question was considered substantial enough for this Court to grant the writ in that case. In this case since the same question of discrimination is present the question must, by force of the same reason, be considered substantial enough to support an order noting jurisdiction.

The appellees' contention that the constitutions of West Virginia and the United States prohibit the use of school property for religious purposes is immaterial. Such issue is not involved in this case because appellants allege that the appellees have permitted other religious organizations to make the identical use of the school auditoriums that they have denied to these appellants. Since the appellees have permitted the use that they claim the constitutions prohibit, they are estopped from here asserting that the doctrine of separation of church and state prohibits the use of school premises for religious meetings.—*Wall* v. *Parrot Silver & Copper Company*, 244 U. S. 408, 411-412 (1917); *United Fuel Gas Company* v. *Railroad Commission of Kentucky*, 278 U. S. 300, 307-308 (1929).

In the event that any member of the Court should conclude that the appellees are entitled to urge the doctrine of separation of church and state as a basis for holding that the question here presented is not substantial, then it is necessary to consider the problem. Appellants say that the question presented upon this appeal is nevertheless substantial, notwithstanding the doctrine of separation of church and state under the disestablishment clause of the First Amendment, because such clause does not preclude appellants from using civic center property owned by the state, opened up to the public for public meetings the same as for any other public use.

The principle of separation of church and state that is supported by the disestablishment clause of the First Amendment is confined to direct financial aid to or exclusive appropriation of public property for religious organiza-

tions in the fostering of their principles. The state is precluded from making grants of money or state aid either directly or indirectly to help foster the principles of a religious organization or maintain it. The state is precluded from appropriating any of its public property and devoting it exclusively to use of a religious organization.

The holding of this Court in *McCollum* v. *Board of Education*, 333 U. S. 203 (1948) does not support the position that civic center buildings may not be used as places of public religious assembly by churches and sectarian groups. The decision in the *McCollum* case is not authority against the use of the civic center buildings by appellants. The decision in that case outlawed completely the use of school time and the course of instruction in the public schools given to children as a result of the compulsory education law to teach religious doctrines, creeds and principles. The operation of the state's compulsory education system was found to assist religious instruction carried on by separate religious sects. The situation presented here is "beyond all question [*not*] a utilization of the tax-supported public [property] to aid religious groups to spread their faith."—333 U. S. 203, at page 210.

That the decision in that case was grounded upon and limited to the fact that the use of the property for such instruction became unconstitutional because it was, in effect, a part of the school program, is proved by the opinion of Mr. Justice Frankfurter. He said: "Religious education so conducted on school time and property is patently woven into the working scheme of the school. The Champaign arrangement thus presents powerful elements of inherent pressure by the school system in the interest of religious sects. . . . The result is an obvious pressure upon children to attend."—333 U. S. at p. 227.

The issue in the *McCollum* case was limited to the precise problem of utilization of the compulsory education process and school system for religious training. It was not based upon the proposition that public property cannot

be used for the exercise of constitutional rights by religious bodies. If the Court so held it would have so stated explicitly.

The *McCollum* case is not controlling here. If a public civic center building dedicated by law and regulation to community purposes by the appellees cannot be so used by a religious group, then by force of the same reason the public streets could be kept back from use by such religious group. The doctrine of separation of church and state ordained in the First Amendment must not be distorted to itself become an abridgment of liberty. If public streets cannot be withheld from religious organizations for exercise of their constitutional rights of free speech, then by force of the same reason public civic center buildings that are open for community meetings may not be denied to such groups for public meeting purposes.

The argument that the proposed use of the public civic center for the public meeting and the delivery of the talk, which constitutes religious service, is appropriation of public funds is such a slight and inconsequential appropriation as to be unworthy of notice.

The Court is referred to many cases involving the use of public schools for religious assemblies. In the decisions various state courts have held that the slight and incidental use of the school for religious assemblies at times when the school buildings are not used for school purposes is not sectarian use in violation of the Constitution. These holdings were made in decisions rendered prior to the passage of the "Civic Center Acts," which permitted the use of the schools for such purposes throughout the country.—See *Nichols* v. *School Directors,* 93 Ill. 61 (1879); *School Directors* v. *Toll,* 149 Ill. App. 541 (1909); *Hurd* v. *Walters,* 48 Ind. 148 (1874); *Baggerly* v. *Lee,* 37 Ind. App. 139, 73 N. E. 921 (1905); *Townsend* v. *Hagan,* 35 Iowa 194 (1872); *Davis* v. *Boget,* 50 Iowa 11 (1878); *Gibbert* v. *Dilley,* 95 Neb. 527, 145 N. W. 999 (1914); *Greenbanks* v. *Bantwell,* 43 Vt. 207 (1870); *Lagow* v. *Hill,* 238 Ill. 428, 87 N. W. 369 (1909).

This Court has held that the guaranty of freedom of worship that is to be found in the First Amendment to the Constitution of the United States gives the right to Jehovah's Witnesses to carry on their religious service on the public streets. In the many cases that have been before this Court the facts made the basis of the convictions that were reversed showed that Jehovah's Witnesses were conducting religious services. They were preaching the gospel on the public streets. In each case they preached the gospel by means of the printed page rather than by speech. The sermons were printed in pamphlet and book form and distributed upon the public streets. This Court found such activity to be preaching, public worship, public religious service and public religious demonstration.—*Murdock* v. *Pennsylvania,* 319 U. S. 105, 108-109, 110 (1943).

In the *Murdock* case the public worship, religious service and religious demonstrations were carried on from door to door by Jehovah's Witnesses. The fact that such religious service was from door to door, rather than upon the public streets, is of no consequence. The case cannot be distinguished. In fact the Constitution guarantees the right to carry on religious service on the public streets as well as from door to door. This was the holding in *Jamison* v. *Texas,* 318 U. S. 413 (1943); *Busey* v. *District of Columbia,* 319 U. S. 579 (1943); (mandate of this Court executed at 78 App. D. C. 189, 138 F. 2d 592). Cf. *Cantwell* v. *Connecticut,* 309 U. S. 626 (1940); *Marsh* v. *Alabama,* 326 U. S. 501 (1946).

In the decisions just referred to the sermons given by Jehovah's Witnesses were in printed form, magazines, pamphlets and books, upon the public streets. That the sermons delivered by Jehovah's witnesses were printed rather than vocalized does not make any difference. This distribution of printed sermons constituted a religious service and a religious demonstration, which was protected against abridgment by the First and Fourteenth Amendments, according to the holdings of this Court in those cases.

The Court has gone further, moreover, and even held that religious demonstrations in a public park by Jehovah's Witnesses are similarly protected against abridgment under the First and Fourteenth Amendments.—*Niemotko* v. *Maryland,* 340 U.S. 268 (1951); *Fowler* v. *Rhode Island,* 345 U.S. 67 (1953).

In *Saia* v. *New York,* 334 U.S. 558 (1948), an assembly and speech almost identical to this were involved. The ordinance forbidding the use of sound device in the holding of public meetings of any kind in the public park without a permit was held by this Court to be void as construed and applied to the facts and circumstances of the case. The assembly was a religious service by Jehovah's Witnesses in a public park. The religious demonstration by Jehovah's witnesses was protected against the enforcement of the ordinance. See also *Sellers* v. *Johnson,* 8th Cir., 163 F. 2d 877 (1947). The *Sellers* case involved the holding of a religious service in a public park. The Court of Appeals held that the constitutions protected the use of the park by Jehovah's Witnesses against efforts of the officials to prevent such religious service.

If the doctrine of separation of church and state, which is implicit in the First Amendment, forbids the holding of religious service and putting on religious demonstrations on public streets and in public civic center buildings, it seems strange that this Court did not consider such sophisticated doctrine in the following cases: *Lovell* v. *City of Griffin,* 303 U.S. 444 (1938); *Schneider* v. *New Jersey,* 308 U.S. 147 (1939); *Cantwell* v. *Connecticut,* 310 U.S. 296 (1940); *Jamison* v. *Texas,* 318 U.S. 413 (1943); *Largent* v. *Texas,* 318 U.S. 418 (1943); *Murdock* v. *Pennsylvania,* 319 U.S. 105 (1943); *Jones* v. *Opelika,* 319 U.S. 103 (1943); *Martin* v. *Struthers,* 319 U.S. 141 (1943); *Taylor* v. *Mississippi,* 319 U.S. 583 (1943); *Busey* v. *District of Columbia,* 318 U.S. 579 (1943); *West Virginia State Board of Education* v. *Barnette,* 319 U.S. 624 (1943); *Follett* v. *McCormick,* 321 U.S. 573 (1944); *Marsh* v. *Alabama,* 326 U.S. 501

(1946); *Tucker* v. *Texas,* 326 U.S. 517 (1946); *Saia* v. *New York,* 334 U.S. 558 (1948); *Niemotko* v. *Maryland,* 340 U.S. 268 (1951); *Fowler* v. *Rhode Island,* 345 U.S. 67 (1953).

It would be incongruous and paradoxical indeed to say that the Constitution guarantees freedom of worship and freedom of conscience and at the same time forbids religious service and religious demonstrations in public places.

The United States Constitution guarantees freedom of assembly. No exception of religious assembly was written into the Constitution. If the framers of the Constitution intended to exempt religious assembly from the protection written into the First Amendment they would have written the exemption into the amendment. It is absolutely not permitted for a state, county or city, or their officials, executive, legislative or judicial, to amend the First Amendment by writing into it an exemption or exception that does not appear in the plain language contained in the amendment. If the freedom-of-assembly guaranty in the First Amendment makes secure the right to hold meetings of other kinds in a civic center building it likewise makes secure the right to hold religious meetings therein.

The doctrine of separation of church and state ought properly to be limited to the boundries fixed by the framers of the First Amendment. What the authors of the amendment had in mind was the prohibition of a state church; they intended to exclude any religion from being aided or supported by public funds. The authors of the amendment did not intend to exclude religion from the benefits of the Constitution. In fact, it has been declared that religion occupies a favored position in the law.

Religious services bear burdens that would ordinarily fall directly upon the government. Were it not for their being available the general public would be required to establish welfare institutions and kindred agencies and services. Thus the government would be required to impose additional taxes and make a heavier demand upon the manpower of the nation. The Christian preaching of the gospel

and religious services rendered enjoins upon the people of good will an obligation to conduct themselves uprightly and to be obedient to all proper law. The contribution to the government through the benefits received by the people from the preaching activity of ministers of religion through their religious services and religious demonstrations cannot be equaled by the government were it to undertake such activity. The charitable activities of ministers of the gospel "constitute not only the 'cheap defense of nations' but furnish a sure basis on which the fabric of civil society can rest, and without which it could not endure."—*Trustees of First M. E. Church South* v. *Atlanta,* 76 Ga. 181, 192; *M. E. Church South* v. *Hinton,* 92 Tenn. 188, 190, 21 S. W. 321, 322; *People* v. *Barber,* 42 Hun (N.Y.) 27; *Commonwealth* v. *Y. M. C. A.,* 116 Ky. 711, 76 S. W. 522.

Uniformly the courts have held that a broad and liberal interpretation should be placed upon the provisions of the various statutes, granting favors to religious organizations. —*Trinidad* v. *Sagrada, etc.,* 263 U. S. 578 (1924); *Helvering* v. *Bliss,* 293 U. S. 144 (1934).

It would be unreasonable to suppose or to contend that the framers of the First Amendment had in mind discriminating against the religious organizations in holding public assemblies. The interpretation of the First Amendment contended for by the appellees requires this Court to discriminate against religious assemblies in favor of all other types of assemblies. This Court cannot write into the First Amendment a discrimination against religious assemblies under the guise of the sophisticated doctrine advanced by the appellees, which is an unlawful stretching of the principle of the separation of church and state. A factitious conclusion would be reached by so doing, which is forbidden by the Constitution. Indeed the Court would be discriminating against the religious organizations and misinterpreting the guaranty of freedom of assembly appearing in the First Amendment.

There has been no appropriation of the civic center build-

ing by Jehovah's Witnesses. They have not excluded other organizations from the use of the civic center. Their use of the school auditorium is only incidental and synchronizes with the use of the school as a civic center by all others in Charleston for recreational and other purposes. The so-called appropriation of public funds by use of the civic center by holding of religious meetings is so slight and inconsequential and incidental as to be unworthy of notice by this Court in considering the so-called applicability of the doctrine of separation of church and state.

It is respectfully submitted that the proper holding of this Court should be that religious assemblies stand on the same strong basis under the First Amendment as do assemblies by any other group for any other purpose in a public civic center.

This Court should hold that the use of the civic center for a religious service is proper and within the strong protecting shield of the First Amendment.

The Court should hold and conclude that the disestablishment clause of the First Amendment does not preclude appellants from using civic centers to hold public meetings and delivering Bible sermons to their audiences.

It is submitted that, because of the foregoing argument, it appears that there is no prohibition of the use of civic center buildings by religious organizations for religious meetings. The disestablishment clause of the First Amendment does not command discrimination against religious meetings.

The above discussion shows that the question presented upon this appeal is nevertheless substantial and the Court ought to take jurisdiction to hear the case. Whether the Constitution itself commands that all religious meetings be kept out of civic center meeting places is itself a substantial question that has not been but ought to be determined by this Court in the event that it is concluded that this question is raised in this case by reason of the holdings of the Circuit Judge of Kanawha County and the ruling of the

appellees based on the advice of the attorney for the Board of Education.

This Court denied writ of certiorari in *Greisiger* v. *Grand Rapids Board of Education,* 340 U.S. 820 (1950). Denial of certiorari does not import that this Court approved the ruling of the court below in that case.—*Darr* v. *Burford,* 339 U.S. 200 (1950), also see Mr. Frankfurter's dissent at page 227; *House* v. *Mayo,* 324 U.S. 42, 47-48 (1945).

This Court also dismissed for want of substantial federal question the appeals in *Halvajian* v. *Board of Education,* 341 U.S. 913 (1951); *Lyon* v. *Compton Union High School,* 341 U.S. 913 (1951); *McKnight* v. *Board of Public Education,* 341 U.S. 913 (1951). The action of the Court in those three cases is not dispositive here. An examination of the records in those cases will disclose that there was not a showing that the use permitted by other organizations that had been denied to the appellants in those cases is similar to the use permitted by the appellees in this case. In those cases the record failed to show that other religious organizations were permitted to make the identical use of the civic center properties applied for by the appellants in those cases.

While the proposed use in all of those cases is identical with the proposed use here by the appellants, it is the facts in reference to discrimination by appellees here in allowing other religious organizations to use the property and denying the use to appellants that distinguish those cases from this one.

It becomes unnecessary, therefore, to consider whether the action of the Court in those cases should be followed here. But in the event that it is urged or concluded that the action of the Court in dismissing the appeals in the *Halvajian, Lyon* and *McKnight* cases for want of substantial federal question is applicable here, then they should be reconsidered here. Because of the need to reconsider the ruling in those three cases the jurisdiction of this Court

ought to be noted and the appeal ought not to be dismissed for want of a substantial federal question.

THE QUESTIONS PRESENTED HERE ARE OF GREAT PUBLIC IMPORTANCE

Throughout the entire United States in countless communities public schools are used as places for community assemblies. By law of many states school auditoriums have been thrown open for civic center purposes at all times when the schools are not used for school purposes. In all the other communities where the schools are not opened by law it has been and still is the general practice, without legislative authority, to permit the thousands of school auditoriums to be used as places of assembly for the discussion of community, state and national problems. Religious assemblies are permitted in these schools in thousands of communities the same as any other assembly. This is especially true in rural districts where there are no buildings for religious assemblies.

It has never been generally considered that such use has been prohibited by the separation clause of the First Amendment to the United States Constitution, as is contended by the appellees. Using these schools in the many, many communities for religious purposes are unnumbered persons. Because of the large number of communities affected, the accepted nationwide practice of allowing religious assemblies in public schools and the large number of people involved, the question presented upon this appeal is of very great and nationwide public importance.

The practice that has been indulged in by appellees in this case of discriminating against appellants is of utmost public importance. This presents a question of very great public importance that ought to be determined. It is whether the Kanawha County Board of Education can discriminate against a religious group in violation of the United States Constitution and "get by with it" and have it approved by

the highest state court. This intolerable condition of discrimination in plain defiance of the equal protection clause of the Fourteenth Amendment approved by the State is of itself of great public importance.

If the Kanawha County Board of Education can "get by" with this, then the next step is to permit all the boards of education in West Virginia to discriminate in violation of the United States Constitution. If the school boards of West Virginia can do it, then all the school boards in the country can do it. While the question has not grown up and developed to such great proportion, the fact is that the decision of the court below is merely the beginning of this type of discriminatory encroachment upon constitutional rights. It is not necessary that such illegal discriminatory policy be permitted to grow until it becomes an epidemic throughout the land in order to make it of public importance. The very fact that the mandate is defied in one instance in a state and that such flouting has received judicial approval by the highest court of that state is alone sufficient to make it of public importance.

It is of great public importance to this Court that all beginnings of encroachment to freedom be extirpated or "nipped in the bud." In this connection it is well to consider the words of Justice Sutherland, dissenting in *Associated Press* v. *National Labor Relations Board*, 301 U. S. 103 (1937), at page 141:

> "Do the people of this land—in the providence of God, favored, as they sometimes boast, above all others in the plenitude of their liberties—desire to preserve those so carefully protected by the First Amendment: liberty of religious worship, freedom of speech and of the press, and the right as freemen peaceably to assemble and petition their government for a redress of grievances? If so, let them withstand all beginnings of encroachment. For the saddest epitaph which can be carved in memory of a vanished liberty is that it was

lost because its possessors failed to stretch forth a saving hand while yet there was time."

CONCLUSION

For the reasons stated it is respectfully submitted that the questions presented by this appeal are substantial and that they are of great public importance so as to justify the noting of jurisdiction and the hearing of oral arguments.

Respectfully submitted,

HAYDEN C. COVINGTON,

Counsel for Appellants.

APPENDIX A

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals, continued and held at Charleston, Kanawha County on the 23rd day of May, 1955, the following order was made and entered, to-wit:

State of West Virginia ex rel. H. E. White, Charles R. Hall, Jennings Lilly, W. C. White and John Roncaglione

vs. Mandamus

Albert Anson, Jr., H. M. Beddow, A. S. Thomas, Jr., H. G. Kennedy, and Dr. H. R. Glas , Members of the Board of Education of Kanawha County, West Virgina, as such Board

On a former day, to-wit, May 16, 1955, came again the State of West Virginia at the relation of H. E. White, Charles R. Hall, Jennings Lilly, W. C. White and John Roncaglione, by Horace S. Meldahl, their attorney, and presented to the Court their first and second petitions, and notes of argument in support thereof, praying for a writ of mandamus to be directed against Albert Anson, Jr.,

H. M. Beddow, A. S. Thomas, Jr., H. G. Kennedy, and Dr. H. R. Glass, Members of the Board of Education of Kanawha County, West Virginia, as therein set forth. Upon consideration whereof the Court being of opinion that a rule should not be awarded, it is therefore ordered that the same be and it is hereby denied, on this second application, as plainly right.

APPENDIX B

STATE OF WEST VIRGINIA
THIRTEENTH JUDICIAL CIRCUIT
CHARLESTON

FRANK L. TAYLOR
Judge

March 12, 1955.

Mr. Horace S. Meldahl
Attorney at Law
209-210 Davidson Building
Charleston, West Virginia

Dear Mr. Meldahl:

Re: State of West Virginia, upon relation of H. E. White, et al.

vs.

Albert Anson, Jr., et al., Members of the Board of Education of Kanawha County, West Virginia

At the time you presented the application for a writ of mandamus in this matter on last Wednesday, I indicated that because of the full schedule of matters previously set, I would be unable to pass upon your petition in the immediate future. However, since that time a number of these matters have been submitted without further hearings and

arguments thereon; and, therefore, I have found time to presently pass upon your petition.

The question raised by your petition presents an interesting legal problem. However, after careful consideration of the petition and the applicable statute and the decisions bearing upon this question, it is my considered opinion that the petition does not state such a case as to warrant the issuance of the extraordinary writ of mandamus. Such a writ may only be issued when there is a clear legal right to the relief sought, and I do not believe that situation is presented here.

It is well settled in West Virginia that a board of education of a school district is a corporation created by the Legislature, and that it has only such powers as are expressly vested in it by statute or those that fairly arise by necessary implication from the powers expressly given. *Herald* v. *Board of Education,* 65 W. Va. 765; and *Dooley* v. *Board of Education,* 80 W. Va. 648. The only statute relative to the present situation is that part of Code 18-5-19 which reads as follows:

> "The board of education of any district or independent district shall have authority also to provide for free, comfortable and convenient use of any school property to promote and facilitate frequent meetings and associations of the people for discussion, study, recreation and other community activities, and may secure, assemble and house material for use in the study of farm, home and community problems, and may provide facilities for the dissemination of information useful on the farm, in the home, or in the community."

Although it is clear that the foregoing statute does not expressly provide for the use of school buildings for religious purposes, it may be argued that by implication the statute is susceptible of such an interpretation. This, however, is debatable. It is my considered view that the

statute is not susceptible of the interpretation that the school board may permit school buildings to be used purely for religious purposes. Moreover, to say the least, the matter is so uncertain that, in the absence of a decision by the Supreme Court of Appeals upholding such right, I do not believe that I would be warranted in granting the relief prayed for in this mandamus proceeding, in view of the rule that a writ of mandamus may only be granted when the legal right is clear.

In other states the authorities passing upon this question are divided, some upholding the use of school property for religious purposes and some denying it. In several states the right to use school property for religious purposes is expressly provided by statute. The authorities on this question may be found in an annotation in 5 A. L. R. at pages 886 and 889.

It may be well to observe at this point that even in those states where the statutes expressly provide for the use of school buildings for religious purposes, it is quite generally held that the granting of such use rests largely within the discretion of the school authorities. *School Director* v. *Toll,* 149 Ill. App. 541. See also *Boyd* v. *Mitchell,* 69 Ark. 202, 62 S. W. 61. These decisions furnish additional authority for the inappropriateness of granting the writ of mandamus prayed for herein which, as heretofore indicated, can only be granted in the case of a clear legal right.

It may or may not be advisable to permit school buildings to be used for religious purposes outside of school hours. However, the granting of such right is a legislative and not a judicial function.

I have endorsed my refusal of the writ upon the petition. As you know, it will not be nesessary under such circumstances to have the petition filed in this Court, nor need there be an order entered here showing the refusal

of the relief sought. The original papers with the refusal noted on the petition may be presented to the Supreme Court, if the petitioner be so advised.

Very truly yours,

/s/ Frank L. Taylor
Frank L. Taylor, Judge.

FLT: LB

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